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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

Robert A. Gordon,

Petitioner

v.

National Aeronautics and Space Administration, et al.,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

1.' The Respondent having conceded in open court that they appropriated property from the Petitioner by improperly assessing the Petitioner a searching fee charge under the Privacy Act, and having been forewarned by the Petitioner prior to civil action that Respondents action was in explicit violation of the U.S Statute; the trial Court and the Respondent concurred at a status call after filing of civil suit that the Petitioner was entitled to fees. At the invitation of the trial court the Petitioner entered a "Voluntary Dismissal Without Prejudice" on condition that the trial court would arbitrate a fee settlement upon this ripe issue:

Is it a denial of Fifth Amendment due process rights for the trial court to then rule [**Res Judicata**] upon the merits of the case (**Privacy Act issues**)

, without a trial, denying the _conceded entitled fees and further precluding the Petitioner from any and all statutory cost-award, remedies under the Act, wherein the parties to the civil action failed to sign any stipulation of agreement as required by Fed. R. Civ. P. 41(a)(1)(ii)?

2. When testimony by the Petitioner and a corroborating witness remains un-impeached by Respondent, which raises a genuine issue of material fact as to whether the Respondent acted with a cynical malice to use the illegal fee assessment, and indeed the prospect of excessive litigation cost, as chilling prophylactic measures to frustrate the petitioners will to exercise or even seek to vindicate rights known to violate the Privacy Act; does the trial court violate petitioners right to due process by dismissing testimony of petitioner and a corroborating witness without the benefit of a trial?

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TABLE OF AUTHORITIES

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Fifth Amendment i,2,8

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5 U.S.C. §552a(f)(5) i,2,3

Rules
Fed.R.Civ.P. 41(a)(1)(ii)..i,2,5,6,8,11

OPINION BELOW

The judgment of the U.S. Court of Appeals D.C. Cir. affirming the trial court decision without an opinion is included herein at Appendix A.

JURISDICTION

The judgment oF the U.S. Court of Appeals D.C. Cir. was entered Dec. 10, 1984. A petition for rehearing filed Jan. 23, 1985 was denied Feb. 13, 1985. (Appendix "B").

Order of U.S. District Court April 6, 1984. (Appendix "C").

A notice of Appeal to the Supreme Court was filed on Mar.12, 1985.

The jurisdiction of this Court is invoked under the provisions of Title 28 U.S.C. §2101(c).

APPLICABLE CONSTITUTIONAL PROVISIONS STATUTES AND FEDERAL RULES OF CIVIL PROCEDURE

Fifth Amendment to the Constitution reads as follows:

> Provisions concerning Due process of law and just compensation clauses.;"No person shall be ---- deprived of life, liberty, or property, without due process of law; ---- ".

The applicable United States statute 5 U.S.C. § 552a(f)(5) "Agency Rules" reads as follows:

> "establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search for and review of the record."

The applicable Fed. R. Civ. P. 41(a)(1)(ii) reads as follows:

> Provisions concerning--"(a) "Voluntary Dissmissal: Effect Thereof.(1) By Petitioner; by Stipulation.--(ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action.--(see Appendix "D").

STATEMENT OF THE CASE

The Respondent assessed the Petitioner a searching fee charge under the Privacy Act notwithstanding being forewarned that their action was in explicit violation of the statute. [5 U.S.C. §552a(f)(5)]. The illegal act was thus not merely inadvertent, and placed a threatening, continuous, monetary barrier before the Petitioner.

Accordingly, a civil complaint was filed on Dec. 8, 1982 under the Privacy Act. Shortly thereafter NASA conceded in a letter to the Petitioner, dated Dec. 14, 1982, that the search fee was improperly imposed and would be refunded. As litigation proceeded, Respondent acted to correct the NASA regulation they had been repeatedly forewarned prior to the civil action was in violation of the Privacy Act. Respondents, thus negated the need for the District Court to grant Petitioner's prayer for relief

that the court "order a mandatory injunction against the Respondent agency to change its code of Federal Regulation for 'fee schedule' to conform with the statutory requirement of the United States Code under the Privacy Act of 1984."[Gordon v. NASA et al. Civil Action No. 82-3472].

At the status call proceeding of Apr. 27, 1983: The trial Court represented itself to the Petitioner and Respondent as follows "under the statutes, or at least two of them that I see here, they (plaintiff) are entitled to counsel fees. Now, the law is clear--as a matter of fact, this court itself was one of those who first made it clear - namely, that the filing of the complaint, following unsuccessful negotiations at the administrative level, entitles the plaintiff if it gets the relief it sought, to counsel fees". The Respondent in fact concurred

and stated "Conceding that they (plaintiff) were entitled to fees. We were trying to wrap up the case without bothering the court with any further matters." Thus with the District Court and Respondent in such agreement with the Petitioner that he was entitled to fees wherein the words of the trial court the "law is clear", Petitioner was willing within this spirit to present this ripe issue no longer in dispute, except for the amount, for resolution. Accordingly, Petitioner filed pursuant to Fed. R. Civ. P. 41(a)(1)(ii) a stipulation of "voluntary dismissal without prejudice" (at the invitation of the trial court) with inclusive settlement agreement, remaining claims, in order to present ripe claim for recovery costs.

However the "Voluntary Dismissal" by Petitioner; "by filing a stipulation of

dismissal signed by all parties who have appeared in the action" [Fed. R. Civ. P. 41(a)(1)(ii)], could not be consummated for the Respondent filed on June 3, 1983 a motion opposing the Petitioner's application for costs and counsel fees and used this forum to argue the merits of the case.

In subsequent pleadings Petitioner tried to keep the issues confined to the narrow ripe issue of the illegal fee assessment the Respondent had already conceded to be violative of Petitioners rights under the privacy act, but Respondent subsequent motions addressed the merits of those claims the Petitioner had reserved, therefore the Petitioner was compeled to file pleadings requesting the trial court to set aside the "voluntary dismissal without prejudice" and set the matter down for a hearing on the merits.

The Court ignored all of the Petitioner's pleadings for a hearing and with clearly perfunctory predispositions on the merits of the case, went beyond the ripe issue presented. The trial court without benefit of trial or even granting Petitioner's request for oral argument, ruled upon the merits of the action in denying the Petitioner's application for cost and fees which had only been submitted to the trial court because the trial court and Respondent had both agreed that Petitioner was entitled to the fees at the status call.

The Petitioner appealed to the U.S. Court of Appeals D.C. Cir. The trial courts judgement was simply affirmed by the lower court. [No Opinion].

CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI

This appeal presents an important substantial question of first impression, in that the sole issue it presents is the contitutionality of the trial courts failure to abide by substantive Federal Rules of Civil Procedure, to wit; Fed. R. Civ. P. 41(a)(1)(ii), with **per se** violation of Fifth Amendment due process rights, which denied the Petitioner a trial on the merits of the case. Therein the lower court so far sanctioned a departure by the trial court, as to call for an exercise of this Court's power of supervision.

Even after being forewarned repeatedly by the Petitioner that Respondents action was in explicit violaton of the Privacy Act; and that their regulation was also in violation of the Act;-and of intent to take civil

action to redeem his right; Respondent consummated their illegal act. The congressional sponsors of the Act clearly recognized such a fee as the most significant, prohibitive obstruction to any citizens will to exercise his rights under the Privacy Act in seeking to obtain his personal records.

This civil action not only acted to redeem a personal pecuniary loss as a result of the defendant's clearly illegal tortious action(of which there is no genuine issue of material fact as a matter of law)but also it is a matter of record that this suit has clearly served the public interest in this matter. This civil action was the precipitous cause in compelling the Defendant agency to correct their illegal federal regulation which stood for approximately 9 years in explicit

violation of the enabling statute. This illegal regulation while unchallenged and unchanged would have remained to injure others of the public by baring their Privacy Act rights due to the illegal risk of pecuniary property loss.

Having removed the continuing threatening monetary barrier of NASA's illegal code of federal regulation by this civil action; The U.S. Court of Appeals decision as it now stands effectively constructs a litigation cost to the Plaintiff's right of action under the Privacy Act notwithstanding that there existed no genuine issue of a material fact as a matter of law of the conceded, tortious action by the agency, which resulted in a direct out of pocket pecuniary loss to the plaintiff without due process. The ultimate result of the U.S. Court of

Appeals decision if allowed to stand would consequently replace and supersede the original illegal agency monetary threat to any will to exercise a right granted in statutory law.

Petitioners briefs before the lower court presented documented evidence which exposed every factual finding in the trial courts order without exception to be clearly erroneous.

Trial Court denied Petitioner any meaningful opportunity to be heard. This constituted a denial of Petitioner's Constitutional right to due process.

ARGUMENT

THE U.S. COURT OF APPEALS DECISION OVERLOOKED THE DISTRICT COURTS DENIAL OF DUE PROCESS OF LAW, ALONG WITH SPECIFIC VIOLATIONS OF APPLICABLE FEDERAL RULES OF CIVIL PROCEDURE. THERE WAS NO TRIAL ON THE MERITS OF THIS CIVIL ACTION.

1.

The District Courts erroneous judgment was made without granting any evidentiary hearing to determine whether Petitioner was entitled to recover under the Act, and without ever ruling upon the Petitioners outstanding motion to expedite or grant an oral argument for the calendaring of the cause of action so that a trial upon the merits of the action could proceed.

2.

The District Court would not rule upon the Petitioners motion to withdraw

his proposed, conditional, "Voluntary Dismissal Without Prejudice" when a stipulation could not be consummated. The District Court in explicit violation of Fed.R.Civ.P. 41(a)(1)(ii) upheld the "Voluntary Dismissal Without Prejudice"(?!) with extreme prejudice toward the Petitioners opportunity to present his case. This rule requires voluntary dismissal "by Plaintiff by stipulation ..signed by all parties who appeared in the action". This never occurred.

3.

The District court as trier of fact, has the primary responsibility of interpreting the demeanor, credibility, and reliability of the witnesses testimony. However, the District Court

judgement offers no view of the sworn affidavit of a witness to the "willful" demeanor of imputed malice by the responsible Respondent official.

The record before the District Court presented testimony by the Petitioner and a witness by sworn affidavit that the Respondent official demeanor at a meeting where the Petitioner paid the illegal fee assessment under protest went beyond "intentional or willful" conduct to an arrogant display of provocative malice. Petitioner had claimed that Respondent, responded " they don't believe you will sue and spend more money to get back the $108.00 you've already had to spend." to his inquiry as to why they would continue to assess the searching fee after he had informed them it was illegal under the Privacy Act. The witness states in his affidavit that

Respondent "....further communicated that 'others' did not believe in effect that he (Mr. Gordon) would spend more money to recover his loss". Respondents Brief before the lower court does not refute, attack or impeach this testimony.

Upon the Petitioners application for cost and fees, after the trial court and Respondent had conceded he was entitled to the fees in open court, the trial court ignored disputed issues of fact raised in supplemental memoranda, and issued an order denying cost and fees which for all intent and purpose constituted summary judgment with respect to the Privacy Act issues.

In short the trial court quite simply, effectively, precluded the petitioner from having a trial.

CONCLUSION

Therefore, it is respectfully summitted that the Appeals Court affirmation of the District Court's order be reversed in full and remanded back to trial court for further proceedings with an order that it is appropriate that a trial upon the merits of the case [Privacy Act issues] should preceed judgment Wherein, there remains disputed issues of fact to be resolved and factual contributions to be weighed.

Respectf ully submitted,

Robert A Gordon 4/14/85

Robert A. Gordon
(Appellant)

AFFIDAVIT OF SERVICE

I HEREBY CERTIFY THAT ON THE 14th day of MAY, 1985, copies of the forgoing PETITION FOR WRIT OF CERTIORARI was hand delivered to the Solicitor General, Department of Justice, Washington, D.C. 20530; and Rebecca L. Ross at 3rd and Constitution Ave N.W. Rm 2816, Washington, D.C. 2001.

Robert A Gordon 4/14/85

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APPENDIX "A"

United States Court of Appeals
For the District of Columbia Circuit

[No Opinion]

September Term, 1984
No. 84-5280

Robert A. Gordon

v.

National Aeronautics and Space Administration, et al.

Appeal from the United States District Court for the District of Columbia

BEFORE: Wright and Mikva, Circuit Judges, and MacKinnin, Senior Circuit Judge

JUDGMENT

This case was reviewed on the record on appeal from the United States District Court for the District of Columbia and was briefed and argued by appellant pro se and by counsel for appellees. The issues presented have received the court's full consideration; they occasion no need for an opinion See D.C. Cir. R. 13(c).

Generally for the reasons stated in

the District Court's order filed April 6, 1984, see Apppendix to Brief for Petitioner at 17-21, it is

ORDERED and ADJUDGED by this court that the judgment of the District Court from which this appeal has been taken is affirmed.

It is FURTHER ORDERED that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. R.14, as amended November 30, 1981 and June 15, 1982.

Per Curiam

For the Court

George A. Fisher
Clerk

Filed Dec. 10, 1984
George A. Fisher
Clerk

APPENDIX "B"

United States Court of Appeals
For the District of Columbia Circuit

September Term, 1984
No. 84-5280

Robert A. Gordon

v.

National Aeronautics and Space Administration, et al.

BEFORE: Wright and Mikva, Circuit Judges, and MacKinnin, Senior Circuit Judge

ORDER

Upon consideration of appellant's petition for rehearing, filed January 23, 1985, it is

ORDERED, by the Court, that the aforesaid petition is denied.

FOR THE COURT
GEORGE A. FISHER, CLERK
BY:
Robert A. Bonner
Chief Deputy Clerk

FILED FEB 13 1985
GEORGE A. FISHER
clerk

APPENDIX "C"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT A. GORDON,

Plaintiff,

v.

NATIONAL AERONAUTICS and
SPACE ADMINISTRATION, et al.,

Defendants.

Civil Action no. 82-3472

ORDER

Before the court are plaintiff's applications for costs and counsel fees, defendant's opposition thereto, supplemental memoranda, and the entire record herein.

At all relevant times, plaintiff was employed at defendant's Goddard Space Flight Center. In August, 1982, plaintiff requested, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. §552, and the Privacy act,

5 U.S.C. § 552a, copies of records concerning the reorganization of one of the Center's divisions and his transfer.

This request produced a few documents relating to the reorganization but none relating to plaintiff. Plaintiff then asked for another search. It produced no new material.

In October, 1982, plaintiff amended his request and another search was conducted. In November, 1982, plaintiff was informed that this latest search had uncovered additional documents. At this time, he was also told he would be charged $108.00 for the search. This charge was then required by NASA's FOIA regulation (14 C.F.R. § 1212.503).

On November 15, 1982, plaintiff, through counsel, wrote the defendant, remonstrating against the imposition of the search fee and stating it would

be paid under protest.

On December 14, 1982, plaintiff was informed that, after reconsideration, NASA had determined that the search fee was improperly imposed and would be refunded . This decision was made within the thirty work days allowed by NASA to resolve an appeal under the Privacy Act (14 C.F.R. §1212.603).

However, on December 8, 1982, before the administrative deadline had passed plaintiff filed this action pursuant to FOIA and the Privacy Act. At a status hearing on April 27, 1983, plaintiff voluntarily dismissed this action without prejudice while reserving the right to file an application for fees and costs. Now, plaintiff's attorney is before this court asking for an award of fees and costs totaling $4,920.00.

Before a plaintiff is eligible for

an award of attorney's fees subsequent to a FOIA suit, it must be determined that he has "substantially prevailed". 5 §U.S.C.552(a)(4)(E). In the absence of a court order, as is the case here "substantially prevailed" has been determined to mean that (1) the suit was necessary to obtain the desired information and (2) a "causal nexus" has been established between that suit and the release of the requested information. Cox v. United States Department of Justice, 601 F.2d 1,6 (D.C. Cir. 1979).

Plaintiff has utterly failed to prove either that his suit was necessary to obtain the desired information or the existence of even the most tenuous links between his law suit and NASA's release of information. Among the factors to be considered when determining if plaintiff's suit

was necessary is whether the defendaant agency acted in good faith. Cox v. United States Department of Justice, supra. Here there is no evidence that NASA was anything but cooperative. Its responses to plaintiff's requests were always timely and the products of its searches were promptly made available to the plaintiff.

Neverless, plaintiff brought this action before the time for defendant's response has passed. Under these circumstances, the mere filing of suit is not evidence of agency intransigence, Apparently, plaintiff believes in what has been called the "squeaky wheel" approach, filing suit prematurely in order to compel a faster response from the defendant agency. E.g., Fund for constitutional Gov. v. National Archives, 656 F.2d. 856, 871 (D.C. Cir. 1981). This Court will

not reward such tactics, especially when administrative remedies were not pursued and the defendant agency acted in good faith.

The "substantially prevailing" test is also used when deciding whether to award fees and costs under the Privacy Act. 5 U.S.C. §552a(g)(3)(B); Sweatt v. United States Navy, 683 F.2d 420, 423 (D.C. Cir.1982). As discussed, plaintiff has not satisfied his burden under this test; and, therefore, no award will be made pursuant to this section.

Plaintiff also claims that he is entitled to the minimum award provided for in 5 U.S.C. §552a(g)(4)(A). This provision requires a minimum award of $1,000.00 when an agency violates §552a(g)(1) (C) or (D), and its actions are determined to be "intentional or willful" and have an

"adverse effect on an individual."

Plaintiff's inartfully drafted papers are not specific, but he is apparently alleging that the concededly improper search fee infringed on his rights under the Privacy Act. But, plaintiff never explains how the imposition of this fee violates the act,particularly when it was promptly refunded through the normal course of bureaucratic events. Nor is there any indication that the imposition of the fee was "intentional or willful". The charge was improper, but was imposed acording to then existing rules. The mistake was quickly corrected through normal review mechanisms and no evidence has been presented that it had any adverse effect on the plaintiff.

The Court is aware that "[a] grudging application of [552(a)(4)(E)] which would dissuade those who have been denied information from invoking

their right to judicial review, would be clearly contrary to Congressional intent". Nationwide Bldg. Maintenance, Inc. v. Sampson , 559 F.2d. 704, 715 (D.C. Cir. 1977). Nevertheless, in this case an award of costs and fees is inappropriate.

Therefore, upon consideration of the plaintiff's application for costs and attorney's fees, defendant's opposition thereto, supplemental memoranda, the entire record herein, and for the reasons stated above it is, by the Court, this __6__ day of April, 1984,

ORDERED that the plaintiff's application for costs and counsel fees is hereby denied.

CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

APPENDIX "D"

Rule 41. Dismissal of Actions.
(a) Voluntary Dismissal: Effect Thereof.
(1) By Plaintiff; by Stipulation. Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.